INDEX.

Subject Index.

	Page.
Statement as to jurisdiction	1
Statutory provision conferring jurisdiction	2
State statute validity of which is involved	3
Date of decree and application for appeal	7
Nature of the case and rulings of the court	7
Cases believed to sustain jurisdiction	10

Table of Cases Cited.

A. Magnano Co. v. Hamilton, Attorney General, etc., No. 589, October Term, 1933 (decided April 2, 1934)	10
Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. Ed. 1248.	10
Great A. & P. Tea Co. v. Maxwell, 284 U. S. 575, 76 L. Ed. 500	10
Great A. & P. Tea Co. v. Morrissett, 284 U. S. 584, 76 L. Ed. 506	10
Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 49 L. Ed. 1108	10
Liggett v. Lee, 283 U. S. 517, 77 L. Ed. 929	10
McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95	10
Poresky, Ex Parte, 290 U. S. 30	10

Statutes Cited.

Act of the Legislature of West Virginia of March 8, 1933, House Bill No. 112 (published in Chapter 36 of the Official "Acts of the West Virginia Legislature, Regular Session, 1933," pages 103-107), Section 1	3
Section 2	4
Section 3	4
Section 4	4
Section 5	5
Section 6	6
Section 7	6
Section 8	6
Section 9	6
Section 10	7
Section 11	7
Section 12	7
Constitution of the State of West Virginia, Article III, Section 10	9
Article X, Section 1	9
Constitution of the United States, 14th Amendment	8
Judicial Code, Section 238, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. 345	2
United States Code, Title 28, Section 380 (Section 266 of the Judicial Code, amended)	2

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

In Equity.

No. 3312.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Plaintiff,

versus

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Defendant.

BEFORE SOPER, CIRCUIT JUDGE, AND MCCLINTIC AND CHESNUT, DISTRICT JUDGES.

STATEMENT ON BEHALF OF DEFENDANT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW DECREE UPON APPEAL.

(Filed April 25, 1934.)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, the defendant, Fred L. Fox, in his individual right and in his official capacity as tax

commissioner of the State of West Virginia, submits his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree in the above-entitled cause:

A.

Statutory Provision Conferring Jurisdiction.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment and decree here complained of is conferred by Judicial Code, Section 238, amended (Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 345) which provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:"
>
> • • • • • • •
>
> "(3) Section 380 of this title."
>
> • • • • • • •

Section 380 of the Title (Judicial Code, Section 266, amended) referred to in the foregoing statute, reads (in part) as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any circuit

judge, acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

State Statute the Validity of Which Is Involved.

The Statute of the State of West Virginia, the validity of which is involved, is House Bill No. 112, passed at a regular session of the Legislature on March 8, 1933, in effect from passage, and published in Chapter 36 of the official "Acts of the West Virginia Legislature, Regular Session, 1933," pages 103-107, which reads as follows:

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof.

Be it enacted by the Legislature of West Virginia:

SECTION 1. It shall be unlawful for any person, firm, corporation, association or copartnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained

a license so to do from the state tax commissioner, as hereinafter provided.

SEC. 2. Any person, firm, corporation, association or copartnership desiring to operate, maintain, open or establish a store in this state, shall apply to the state tax commissioner for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state tax commissioner, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license, the name of such store, and such other facts as the state tax commissioner may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

SEC. 3. As soon as practicable after the receipt of any such application, the state tax commissioner shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination the state tax commissioner shall find that any such application is not in proper form and does not contain the necessary and requisite information, he shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid, the state tax commissioner shall issue to the applicant a license for each store for which an application for license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

SEC. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar

year. On or before the first day of January of each year, every person, firm, corporation, association or copartnership having a license shall apply to the state tax commissioner for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state tax commissioner. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued; if a renewal license has not been made, the state tax commissioner shall notify such delinquent license holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

SEC. 5. Every person, firm, corporation, association or copartnership opening, establishing, operating, maintaining one or more stores or mercantile establishments, within this state under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The annual license fee prescribed herein shall be as follows: (1) Upon one store, the annual license fee shall be two dollars for each such store; (2) upon two stores, or more, but not to exceed five stores, the annual license fee shall be five dollars for each such additional store; (3) upon six stores or more, but not to exceed ten stores, the annual license fee shall be ten dollars for each such additional store; (4) upon each store in excess of ten, but not to exceed fifteen, the annual license fee shall be twenty dollars for each such additional store; (5) upon each store in excess of fifteen and not to exceed twenty stores, the annual license fee shall be thirty dollars for each such additional store; (6) upon each

store in excess of twenty, but not to exceed thirty stores, the annual license fee shall be thirty-five dollars for each such additional store; (7) upon each store in excess of thirty, but not to exceed fifty stores, the annual license fee shall be one hundred dollars; (8) upon each store in excess of fifty, but not to exceed seventy-five stores, the annual license fee shall be two hundred dollars; (9) upon each store in excess of seventy-five the annual license fee shall be two hundred fifty dollars for each additional store.

SEC. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section five of this act.

SEC. 7. The provisions of this act shall be construed to apply to every person, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

SEC. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

SEC. 9. Any person, firm, corporation, copartnership, or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

SEC. 10. Any and all expenses incurred by the state tax commissioner in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act shall be paid into the state treasury, monthly, by the state tax commissioner, and shall be added to and shall constitute a part of the general fund for the elementary schools.

SEC. 11. No injunction shall issue from any court in this state enjoining the collection of any license tax provided herein, but the party claiming that any license is not due, for any reason, shall pay the same under protest with right to collect the same from the state tax commissioner by an appropriate remedy as provided by law.

SEC. 12. The provisions of this act are several, and if any section, provision, word or clause of this act be declared invalid, the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared as a legislative intent that this act would have been adopted had such invalid portion not been included herein.

C.

Date of Decree and Application for Appeal.

The decree sought to be reviewed was entered on the 2nd day of April, 1934.

The application for appeal is presented on this the 25th day of April, 1934.

D.

Nature of Case and Rulings of the Court.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by Standard Oil Company of New Jersey, a corporation

created under the laws of the State of Delaware, against defendant, Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, to secure an injunction to restrain the defendant from paying into the treasury of the State, tax money in the sum of $240,173.50, paid to him under protest by the plaintiff, by reason of the provisions of an Act of the Legislature of West Virginia known as the "Chain Store Tax Act" (House Bill No. 112, Chapter 36, Acts 1933 Regular Session) on account of license taxes for the operation and maintenance of certain stores owned by plaintiff, and to restrain defendant from in any manner enforcing against the plaintiff the provisions of said House Bill No. 112.

The Act requires a license for the operation of each store graduated in amount according to the number of stores operated by the same person, firm or corporation, and vests the administration thereof in the State Tax Commissioner.

The bill alleged that the State Tax Commissioner had required plaintiff to pay the license for 1,003 stores totaling $240,173.50.

The plaintiff gave notice of application for and sought an interlocutory injunction, and insisted thereon and sought the relief upon the alleged unconstitutionality of the Act under the Constitution of the United States, because:

1. The Act deprived the plaintiff of property without due process of law and denied the plaintiff the equal protection of law, contrary to the provisions of the Fourteenth Amendment.

2. The plaintiff sought relief on grounds involving other than Federal questions, because:

(1) The gasoline filling or service stations and bulk distributing plants operated by plaintiff and for the operation of which the tax was imposed, are not stores within the meaning of the term "stores" as defined in the Act.

(2) If construed to be applicable to plaintiff, it violates the provision contained in Section Ten of Article Three of the Constitution of West Virginia, that no person shall be deprived of property without due process of law.

(3) If applied to plaintiff, it violates the provision of Section One of Article Ten of the Constitution of West Virginia, ratified and adopted by the voters of the State at a General Election held on November 8, 1932, that taxation shall be equal and uniform throughout the State.

The defendant moved to dismiss the bill on the ground that the Federal questions raised were frivolous and unsubstantial, because the right to impose a graduated license tax on chain stores had been so firmly established by the decisions of the Supreme Court of the United States that the contention that said House Bill No. 112 violated the Fourteenth Amendment to the Federal Constitution no longer constituted a substantial Federal question; and further that there was no equitable jurisdiction because plaintiff had an adequate remedy at law.

Defendant resisted the granting of injunctive relief on the grounds that plaintiff's filling or service stations were "stores" within the meaning of that term as defined and used in the Act; and that the Act did not violate any provision of the Federal or State Constitutions.

The judge of the District Court convened a court of three judges under Section 266, amended, of the Judicial Code (28 U. S. C. A., Sec. 380). The court, upon hearing the cause, held: That no adequate legal remedy had been afforded the plaintiff, and that, therefore the court was empowered to entertain the application for injunction and decide all questions involved, both State and Federal; that the equal protection of the law guaranteed by the Fourteenth Amendment was denied the plaintiff by the Act; that the filling or service stations of plaintiff were not

stores as the term was defined in the "Chain Store Act," and that the tax of $240,173.54, imposed upon the plaintiff corporation and paid by it under protest, was improperly collected, and that it is entitled to a decree whereby the defendant will be perpetually enjoined and restrained from paying said money into the State Treasury of West Virginia, and will be ordered and directed to account for and pay over said sum to the plaintiff.

Cases Believed to Sustain Jurisdiction.

1. *Direct Appeal from Statutory District Court.*

Cases sustaining direct appeal to the Supreme Court of the United States from special statutory court under Section 266, amended, Judicial Code:

Board of Tax Commissioners v. *Jackson,* 283 U. S. 527, 75 L. Ed. 1248;

Great A. & P. Tea Co. v. *Maxwell,* 284 U. S. 575, 76 L. Ed. 500;

Great A. & P. Tea Co. v. *Morrissett,* 284 U. S. 584, 76 L. Ed. 506;

A. Magnano Co. v. *G. W. Hamilton, Attorney General* (Wash.), *et al.,* Supreme Court of the United States, October Term, 1933, No. 589, decided April 2, 1934. Not yet reported.

2. *Existence of Federal Questions.*

In addition to the cases cited under (1), among others, the defendant will rely upon the following cases:

Ex Parte Joseph Poresky, 290 U. S. 30;

McGilvra v. *Ross,* 215 U. S. 70, 54 L. Ed. 95;

Leonard v. *Vicksburg, S. & P. R. Co.,* 198 U. S. 416, 49 L. Ed. 1108;

Liggett v. *Lee,* 283 U. S. 517, 77 L. Ed. 929.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal petitioned for in this cause.

HOMER A. HOLT,
Attorney General of West Virginia,
Counsel for Defendant.

The undersigned counsel of record for the plaintiff hereby acknowledge service of a copy of the above statement as to jurisdiction on appeal.

Dated at Charleston, West Virginia, this 25th day of April, 1934.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel.